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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF [redacted]
AND BRIEF IN
SUPPORT THEREOF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 316

M. T. McARTHUR,

Petitioner,

vs.

WILLIAM W. FAW, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

To the Honorable Supreme Court of the United States:

Petitioner M. T. McArthur, respectfully shows:

I

History of the Case

This suit was brought by petitioner in the Chancery Court at Johnson City, against respondent Wm. W. Faw and others, to compel specific performance of a contract between petitioner and respondent, under which petitioner claimed respondent was bound to transfer and assign to petitioner certain shares of stock in John Sevier Hotel Corporation, a Tennessee corporation. Decree was against petitioner in the Chancery Court at Johnson City. Upon

appeal to the Court of Appeals of Tennessee at Knoxville, the decree of the Chancery Court was reversed, and decree entered directing specific performance, and remanding the cause to the Chancery Court for execution of the decree. Respondent Faw petitioned the Supreme Court of Tennessee for the writ of certiorari, which was denied. Thereupon respondent Faw petitioned for a rehearing, which was likewise denied, and the cause remanded to the Chancery Court. Thereafter respondent Faw filed a petition to be allowed to file a second petition to rehear which was granted, but he filed no second petition to rehear. Thereupon the Supreme Court entered an order allowing respondent Faw's petition to rehear, granted the writ of certiorari, and placed the cause on the docket for argument and after argument handed down an opinion reversing the Court of Appeals, and dismissing petitioner's suit. To this action of the Court petitioner McArthur filed in time, a petition to rehear, raising the questions herein presented. This petition to rehear was overruled in a per curiam opinion, and final decree entered March 19th, 1946.

II

Matters Involved and Reasons for Allowing the Writ

Petitioner claims that the action of the Honorable Supreme Court of Tennessee was *coram non judice,* and deprived petitioner of his rights and property without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, in that: (i) when said Court denied the petition of Wm. W. Faw for the writ of certiorari, and denied his petition to rehear and reconsider that opinion and action, as a result of which the cause was remanded to the Chancery Court at Johnson City, petitioner McArthur's rights became vested and fixed under the opinion and judgment of the Court of

Appeals, and the Supreme Court lost jurisdiction and control of the case, and the grant of a rehearing and the writ of certiorari in response to the subsequently filed petition of respondent Faw to be allowed to file a second petition to rehear, was *coram non judice,* and a deprivation of petitioner's rights and property without due process of law; and (2) that the aforesaid action of the Supreme Court of Tennessee was a departure from the established rules of law and procedure in Tennessee, and from the equal administration of the law according to established rules, and denied to petitioner equal protection of the law.

Fourteenth Amendment to Const. of U. S., Sec. 1.

III

Jurisdiction

The jurisdiction of this Court is invoked under Act of February 13, 1925, Title 28, U. S. C. A. sec. 344, and especially sub-section (b) of said Section 344, which provides:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States; and the power to review under this paragraph may be exercised as well where

the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

Title 28, U. S. C. A. Sec. 350.
Rule 38 of this Court.
Const. of U. S. Fourteenth Amend. Sec. 1.

IV

Facts Necessary for Decision

The bill alleged a contract between petitioner McArthur and respondent Faw, by which respondent Faw became bound to assign and transfer to petitioner McArthur ——— shares of the common and ——— shares of the preferred stock of John Sevier Hotel Corporation, a Tennessee corporation, pursuant to an agreement to equalize their holdings (Bill R. 1, and amendments R. 15, 26, 49).

The answer denied the contract, and averred it was in any event contrary to public policy, because it attempted to control the affairs of the corporation for the benefit of majority stockholders, regardless of the interests of minority stockholders. (Answer, R. 28, and amendment R. 56-59).

The decree of the Chancery Court held (1) that no contract had been arrived at, and (2) that in any event the contract would be against public policy on the grounds above set out. (Chy. Ct. Decree and Opinion, R. 95, 130).

Respondent McArthur appealed to the Court of Appeals of Tennessee at Knoxville, which Court reversed the decree of the Chancery Court, held there was a valid contract, and decreed specific performance, (See Opinion Court of Appeals R. 140, and Decree, R. 158). Petition was there-

upon filed by respondent Faw in the Supreme Court of Tennessee at Knoxville, praying issuance of the writ of certiorari to said Court of Appeals (R. 167). The writ was denied by the Supreme Court May 5, 1945, (R. 320), but formal order was not entered thereon until May 21, 1945, (R. 320). Repondent Faw filed with the Supreme Court a petition to rehear the order denying the petition for certiorari on May 14, 1945 (R. 221). Pursuant to order extending time to file such petition, passed May 5, and entered May 8, 1945 (R. 221), and prior to entry of the order overruling the petition for certiorari on May 21, 1945, (R. 320) said petition to rehear was specifically denied by the Supreme Court by decision handed down June 8, 1945 (R. 245), and announced June 9, 1945 (See R. 332, 333, 334, 320), and order was entered pursuant thereto on the 20th day of June, 1945 (R. 319), or June 30, 1945 (R. 245), order bearing both dates in the record. On June 9, 1945, procedendo with certified copy of opinion and decree of the Court of Appeals was filed in the Chancery Court at Johnson City (R. 305-309). On June 19, 1945, respondent Faw filed a petition to be allowed to file a second petition to rehear the action of the Court on May 5, 1945, denying his petition for certiorari. (R. 246, 248). No second petition to rehear was filed. On June 20 (30), 1945, the Supreme Court announced that petition to rehear was granted and writ of certiorari allowed (R. 249), and order was entered pursuant thereto on the 1st day of July, 1945, (R. 249), nearly two months after the Court had announced denial of the writ, twenty days after procedendo had been entered in the Chancery Court, twenty-one days after announcement of overruling of petition to rehear. The case was set down for argument at the September, 1945 term. On August 3, 1945, the Supreme Court ordered further proceedings in the Chancery Court stayed (R.

262). The cause was argued in the Supreme Court in October, 1945, and opinion reversing the Court of Appeals, inferentially holding there was a contract, but that its terms violated the Uniform Fraudulent Conveyance Statute (Tennessee Code Sec. 7277), and set up a spendthrift trust, and dismissing complainant McArthur's suit handed down January 19, 1946 (R. 264). Thereupon, petitioner McArthur filed in the Supreme Court of Tennessee, on January 28, 1946, within the ten days allowed by rule 32 of that Court, his petition to rehear, review and revise said opinion upon the ground, among others, that the action of the Court was *coram non judice* and deprived him of his property without due process of law, denied to him the equal protection of the law, and deprived him of the freedom of contract, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States (R. 275, *et seq.*). Said petition of petitioner McArthur to rehear was overruled and disallowed by the Supreme Court of Tennessee by per curiam opinion handed down on March 2, 1946 (R. 335), and final decree entered on the 19th day of March, 1946, (R. 338). The contract which the Supreme Court of Tennessee found contravened the Uniform Fraudulent Conveyance Statute (Tenn. Code Sec. 7277), and set up a spendthrift trust, is set forth in a letter from respondent Faw to his attorney Guy S. Chase, with copy to petitioner McArthur, dated February 13, 1943, (copied in opinion of the Supreme Court of Tennessee of January 19, 1946, R. 265-267).

V

Probable Errors

I. When the Supreme Court of Tennessee denied respondent Faw's petition for certiorari on May 5, 1945, and denied his petition to rehear, filed within the time allowed

for a petition to rehear, on June 8, 1945, and the cause was remanded to the Chancery Court at Johnson City on June 9, 1945, petitioner McArthur acquired a vested interest in and property right to 112 shares of the common stock and 113¼ shares of the preferred stock of John Sevier Hotel Corporation, and it was error for the Supreme Court on July 1st, 1945, to grant respondent Faw's petition to rehear (original petition theretofore overruled (R. 245 and 319) (no new petition to rehear was filed) and to allow the writ of certiorari, and its action was *coram non judice* and its opinion and decree reversing the Court of Appeals, deprived petitioner of his property and rights without due process of law.

II. This departure by the Supreme Court of Tennessee from the long and well established law and rules of procedure in Tennessee denied to petitioner McArthur the equal protection of law, and was error.

VI

The Question of Violation of Petitioner's Constitutional Rights Was Raised at the First Opportunity

When the Supreme Court of Tennessee granted an order on June 30, 1945, allowing the writ of certiorari in this case, Petitioner McArthur, believing the Court acted inadvertently, filed on July 10, 1945, what he designated as a petition to rehear. Such a petition did not, however, lie at that time, as the opinion and order of the Court were interlocutory. Its purpose was merely to call the Court's attention to the unusual course being taken and the inadvertence into which we believed the Court had fallen. No affirmative or final action to deprive Petitioner of his constitutional rights was taken by the Court until its opinion of January 19, 1946, (R. 264). In view of the fact that

the inadvertence to which we had called the Court's attention was not mentioned in its opinion of January 19, 1946, it would appear that the Court either pretermitted it inadvertently, or considered the petition to rehear its action in granting the writ premature. In any event we could not anticipate the action of the Court in its opinion of January 19, 1946, and promptly filed our petition to rehear on January 28, 1946, urging upon the Court that its action on January 19, 1946, denied to petitioner McArthur his constitutional rights under the Fifth and Fourteenth Amendments to the Federal Constitution; which was, we submit, at the first opportunity.

Saunders v. *Shaw*, 244 U. S. 317, 61 L. Ed. 1163.

In its opinion of January 19, 1946, (R. 264), the Supreme Court of Tennessee decided the case on questions never raised or discussed either in briefs or oral arguments, and, notwithstanding petitioner McArthur pointed this out to the Court and asked that the cause be reset for oral argument on the questions on which the Court based its opinion (R. 303), and notwithstanding the provision of Code Sec. 10629 that no writ of certiorari shall be granted unless the cause is set down for oral argument, the Court declined to hear oral argument on these questions. (R. 337).

WHEREFORE, your petitioner respectfully prays that the writ of certiorari issue out of and under the seal of this Honorable Court, directed to the Supreme Court of Tennessee, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cause therein of M. T. McArthur, Complainant v. Wm. W. Faw, et al., defendants, sometimes styled in said Court Wm. W. Faw, Petitioner for Certiorari, vs. M. T. McArthur, Respondent, being

cause #—— from the Chancery Court at Johnson City, Washington County, Tennessee, and that the judgment of the Supreme Court of Tennessee, may be reversed by this Honorable Court; and that your petitioner M. T. McArthur may have such other, further and general relief in the premises as to this Honorable Court may seem just and proper; and your petitioner will ever pray.

M. T. McArthur,
Petitioner,

By John H. Winston,
J. R. Simmonds,
A. B. Bowman,
Counsel for Petitioner;

Winston & Guinn,
Simmonds & Bowman,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 316

M. T. McARTHUR,

Petitioner,

vs.

WM. W. FAW, ET AL.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion and Decree of the Supreme Court of Tennessee Complained of

The first opinion in this cause, reversing the Court of Appeals was handed down by the Supreme Court of Tennessee on the 19th day of January, 1946, and the opinion on petition of McArthur to rehear, was handed down March 19, 1946, at pp. 264-273 and 335-337 of the record, and are published in Southwestern Reporter Advance Sheets, dated the 21st day of May, 1946, S. W. Vol. 193, pp. 763 and 770. The final decree was entered March 19, 1946. (R. 338-339).

II

Jurisdiction

The jurisdiction of this Court is invoked under Acts of February 13, 1935, Title 28, U. S. C. A. Sec. 344. and

especially subsection (b) of said Section 344, which provides:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."
>
> Title 28, U. S. C. A., Sec. 350;
>
> Rule 38 of this Court;
>
> Const. of United States, Fourteenth Amendment, Sec. 1.

III

ARGUMENT

Material Facts Which Petitioner Claims Give Rise to the Federal Question

The opinion of the Court of Appeals was handed down November 14, 1944 (R. 140) and decree entered November 24, 1944 (R. 158).

Respondent Faw's petition for certiorari (R. 167) was filed December 27, 1944, within the statutory period (Code Sec. 10629). This petition was denied by opinion of the Supreme Court *announced* May 5, 1945 (R. 221), order on which was entered May 21, 1945 (R. 220). On May 5, 1945, at time of announcement of opinion denying the writ, the time for filing a petition to rehear was extended for ten days (R. 221). Respondent Faw filed petition to rehear on May 14, 1945 (R. 221), within the time required by Rule 32 of the Supreme Court of Tennessee, *ante,* and within the time allowed by order of the Court (R. 221). Opinion of the Supreme Court denying the petition to rehear was *announced* at Nashville on June 8, 1945 (R. 245), and sent by the Clerk of the Supreme Court at Nashville on June 8th, 1945, to the Clerk of the Supreme Court at Knoxville (R. 333), and received by the Clerk at Knoxville in due course of mail on June 9th, 1945 (R. 333-334). On June 8, 1945, the Clerk of the Supreme Court at Knoxville, pursuant to the provisions of Code Secs. 8867 and 9058.1, *infra,* issued mandate from the Court of Appeals at Knoxville to the Chancery Court at Johnson City, and certified therewith under date of June 8, 1945, decree of said Court of Appeals, and same were lodged and marked filed in the Clerk's office of said Chancery Court on June 9, 1945 (R. 305-309). Under Tennessee Code Section 10531, the cause

was reinstated in said Chancery Court for the purpose of executing said decree of the Court of Appeals, and petitioner's rights thereunder became fixed and vested; and the Supreme Court's jurisdiction over said case ended, and any subsequent action by it therein was *coram non judice.*

On June 19, 1945, respondent Faw filed in the Supreme Court of Tennessee, an "Application * * * to file a second petition to rehear" (R. 246). This document prays the right to file "another petition to rehear, or, in the alternative, that this motion be treated as a petition to rehear" (R. 248). No other or new petition to rehear was filed, and this paper does not in any wise comply with Rule 32 of the Court governing petitions to rehear. On June 20, 1945, the Court announced its "opinion that the petition to rehear is well taken" and is allowed (R. 249). On June 20, an order was entered denying Faw's petition to rehear (R. 319); on June 30, another order was entered to the same effect (R. 245). On July 1, 1945, an order headed "Second petition to rehear granted" (the word "second" written in pencil), and granting the writ of certiorari was entered (R. 249). On August 3rd, 1945, nearly two months after procedendo was filed in the Chancery Court, an order was entered in the Supreme Court purporting to vacate its order of May 21, 1945, denying writ of certiorari (under opinion handed down May 5, 1945) and order denying the first petition to rehear entered June 20, 1945, and again on June 30, 1945 (under opinion announced June 8, 1945), and directing a stay of further proceedings in the Chancery Court "until a later order of this Court" (R. 262). The cause was argued in the Supreme Court in October, 1945, and opinion reversing the Court of Appeals and dismissing the bill handed down January 19th, 1946 (R. 264). On January 28, 1946, petitioner McArthur filed his petition to rehear in the Supreme Court of Tennessee, within ten days of

the rendition of the opinion as required by Rule 32 (R. 275), which was overruled in a *per curiam* opinion handed down March 2, 1946 (R. 335), and final decree entered March 19, 1946 (R. 338).

It is submitted that the action of the Supreme Court was a departure from the settled rules of law and procedure in Tennessee, and a denial to petitioner of due process of law.

Long Established and Settled Rules of Law and Practice, Statutory and Otherwise, in Tennessee under Which Petitioner Was Entitled to be Judged Without Discrimination.

The long and well settled practice and procedure in appealed cases is as follows:

(1) An appeal lies on the law and the facts, as a matter of course, from final decrees of the Chancery Court, tried according to the rules of Chancery practice, to the Court of Appeals.

Williams (1932), Code of Tenn., Sec. 10618.

Of this petitioner availed himself successfully.

(2) An appeal does not lie from the Court of Appeals to the State Supreme Court, but review may be had only by petition for certiorari, filed within forty-five days after entry of decree in the Court of Appeals.

Williams (1932), Code of Tenn., Sec. 10629;
Schlasser Leather Co. v. *Gillespie*, 157 Tenn. 166.

(3) Petitions for rehearing in the Supreme Court are regulated by Rule 32 of that Court, published in 173 Tennessee, pages 886-87, reading as follows:

> "Petitions for rehearing, before being presented to the Court, will be furnished to the opposite counsel; and after both sides have prepared briefs, the record,

together with the petition and briefs, will be presented to the Court without argument. If the court determines that the cause shall be reheard, the change of opinion will be announced, or the counsel will be notified, and the point or points on which reargument is desired will be indicated, and the time for reargument designated. But petitions for rehearing must, in all cases, be presented to the Court within ten days after the opinion in the case sought to be reexamined *is announced,* except decisions made within the last ten days of the term, and, in such cases, the petition must be presented as soon after the decision is made as practicable, and prior to adjournment of the term. No petition will be received on the last day of the term, other than in cases then decided.

A rehearing will be refused where no new argument is made, and no new authority adduced, and no material fact is pointed out as overlooked (76 Tenn. (8 Lea), 763; 78 Tenn. (10 Lea), 7; L. & N. RR. Co. *v.* U. S. Fidelity & Guaranty Co., 125 Tenn. 658, 691, 693)."

(4) The 1932 Code of Tennessee (Williams'), Sec. 8867, provides:

"FROM SUPREME COURT AND COURT OF APPEALS AFTER TEN DAYS FROM FINAL JUDGMENT OR DECREE. The Clerks of the Supreme Court and of the Court of Appeals are authorized and directed to issue execution and writ of possession upon any final judgment or decree of their respective courts at any time after the expiration of the ten days allowed for the filing of petition to rehear after said final judgment or decree is rendered by either of said courts (1903, Ch. 58; 1907, Ch. 82, Sec. 6, modified)."

The Public Acts of Tennessee, for 1937, Ch. 111, Sec. 1, codified in pocket supplement to said Code as Sec. 9058.1, provides:

"CERTIFICATION OF FINAL DECREES TO INFERIOR COURTS. All final decrees rendered in either the Court of Appeals or the Supreme Court rendered upon appeal

from any inferior court of this State shall be certified by the Clerk of the Supreme Court or Court of Appeals to the court from which such case was appealed, and the cost or expense of such certified copy of such final decree shall be included by the Clerk in the bill of costs and be a part thereof, collectible as other costs are now collectible".

Section 10531 of said Code, provides:

"REMANDED CASES ARE REINSTATED ON FILING CERTIFIED COPY OF DECREE OR MANDATE WITH CLERK. In all cases remanded by the Supreme Court, or Court of Appeals, to any court for the execution of an order of reference, order of sale, or for other proceedings directed in the decree of the appellate court or in the decree of the lower courts as affirmed or modified by the appellate court, *such cases shall be deemed reinstated in the lower court from the time of filing with the clerk and master or clerk thereof, a certified copy of the decree or mandate of the appellate court;* and thereafter such cases may be proceeded in, in accordance with the decree of the appellate court, without any action of the lower court thereon. It shall not be necessary for the decree or mandate of the appellate court to be spread of record, in the lower court, by direction of the lower court, before the clerk and master, clerk of the court, or the parties may proceed in said case in accordance with the decree or mandate of the appellate court (1901, Ch. 10, Sec. 1, Modified)." (Emphasis ours.)

These are settled rules of law and practice in Tennessee under which all citizens are to be equally judged, and under which they are entitled to equal protection.

The general rule, in the absence of statute, is stated in American Jurisprudence Vol. 3, p. 345, Appeals and Error, Sec. 796, as follows:

"After an appellate court has heard a case, and the mandate has been regularly issued, and the case has been sent down to the lower court, it is generally held

> that the appellate court has no further jurisdiction of the case and is without power to grant a rehearing."

Without multiplying citations of authority, we call attention to an exhaustive note in 84 A. L. R. beginning at page 579, wherein it is shown that the clear weight of authority supports the above quotation from American Jurisprudence.

It is submitted that not only is there no statute in Tennessee authorizing the recall of a case once remanded, but that the above quoted code sections expressly prohibit it.

It was insisted by respondent Faw in the Supreme Court of Tennessee ,that the procedendo issued inadvertently (see affidavit of Anna S. Boyd "Secretary in the office of Supreme Court," R. 320), and stated by the Supreme Court in its *per curiam* opinion overruling petitioner McArthur's petition to rehear that the Court was advised by the Clerk that the procedendo was inadvertently issued, and that it issued while the petition to rehear was pending in that Court (R. 335). However, it is respectfully submitted the record shows it was in conformity with the Tennessee statutes, and on the very date the opinion of the Court overruling Faw's petition to rehear was handed down, June 8, 1945, and filed in the Chancery Court on June 9, 1945, at which time nothing was pending before the Supreme Court of Tennessee (See R. 332, and R. 333-334). The Supreme Court never recalled said procedendo or mandate, but on the contrary undertook to stay proceedings thereon in the Chancery Court by an order entered August 3, 1945 (R. 311). If said procedendo were inadvertently issued, it should have been recalled; if properly issued, the Supreme Court had no jurisdiction to order the stay (Tenn. Code Sec. 10531). The record also discloses that the formal order overruling Faw's petition for certiorari was filed with the Clerk on May 21, 1945 (R. 320), and the formal

order overruling Faw's petition to rehear was filed in the Clerk's office on June 20, 1945 (R. 319), at which time the procedendo and final decree of the Supreme Court were on file in the Chancery Court, as required by Code Sections 9058.1 and 10531. Therefore, whether we give effect to the action of the Supreme Court in denying the certiorari on May 5th, 1945, or May 21, 1945, and the petition to rehear on June 8th or June 20th, 1945, Code sections 9058.1 and 10531, apply, and that Honorable Court lost all jurisdiction, and its subsequent action in the case was *coram non judice*, and void and lacking in due process of law.

Although *obiter dicta*, the Supreme Court of Tennessee recognized in *Overton* v. *Bigelow*, 10 Yerk (18 Tenn.) 48, that a remand to the Chancery Court terminates its jurisdiction in the following language:

> "It was *res adjudicata* when the petition was filed and beyond the control of the Court as much as if no account had been ordered nor any other step directed merely in execution of the decree * * *. The retention of this cause in Court, for the purpose of carrying the decree into execution, gave the Court, at a subsequent term, *no more control over the decree itself than if the case had been sent down to the Chancery Court for the execution of the decree.*" (Italics ours.)
>
> *Overton* v. *Bigelow's Admr. supra*, at p. 52-53.

That Court has also, in dealing with jurisdiction of inferior courts, held that once control is lost over a decree by statute, the Court can not readjudicate the same matters, nor alter its decrees.

Shipley v. *Barnett*, 161 Tenn. 439.

As to the so-called second petition to rehear referred to in the order of the Supreme Court announced "June 20 (30) 1945" (R. 249), entered July 1, 1945 (R. 249), we

respectfully submit the record fails to show any "second petition to rehear" was ever filed. A petition to be allowed to file a second petition to rehear by respondent Faw was filed June 19, 1945, but no second petition in compliance with rule 32 of that Court, quoted above, was filed.

The Supreme Court has held that rules of Court, when not in conflict with statutory provisions, are the law of the Court.

Van Brocklin v. *Wolcott &c. Co.*, 5 Heisk. (52 Tenn.) 743, 745;

Hilton v. *Johnson City Gen'l Hospital,* 160 Tenn. 535.

The rule regulating petitions to rehear in the Supreme Court of Tennessee is not forbidden by statute, but is expressly recognized, and, so far as the time limit is concerned, is incorporated in Code Section 8867, and, we respectfully submit, is "the law of the land," which cannot be arbitrarily disregarded to deprive petitioner of his property. It will be noted that the so-called "second petition to rehear" or as styled by its author, "Application of Petitioner Wm. W. Faw, to file a second petition to rehear," was not a petition to rehear, nor was it a petition to rehear the action of the Court denying his first petition to rehear, but was addressed to the action of the Court "on May 5, 1945, in denying his petition for writ of certiorari" (R. 279), and was filed forty-five days after the petition of the Court complained of.

The Action of the Supreme Court of Tennessee denied to petitioner, McArthur, his rights under the Constitution of the United States, Fourteenth Amendment, Section 1, in that it denied to him the equal protection of the law, and deprived him of his property without due process of law.

"Rights acquired by judgment are property rights which cannot be taken without due process of law."

American Jurisprudence, Consti. Law, Sec. 660;
Collins v. *Welsh* (C. C. A. 9th) 75 F. (2d) 894, 99 A. L. R. 1819, writ of certiorari denied in 295 U. S. 762; 55 Sup. Ct. 921; 79 L. Ed. 1704;
Gilman v. *Tucker*, 128 N. Y. 190, 13 L. R. A. 304.

While most of the cases under the "due process of law" of the Constitution of the United States deal with legislative acts impairing property rights, the due process clause equally applies to judicial acts.

"'Due process of law,' is defined as the law of the land, designed to protect and preserve the rights of citizens against arbitrary legislation, as well as against arbitrary executive or judicial action. State *v.* Ashbrook, 55 S. W. 627, 632, 145 Mo. 375, 48 L. R. A. 265; 77 Am. St. Rep. 765."

Words and Phrases, p. 586.

"The words 'due process of law' in Fourteenth Amendment to Federal Constitution forbidding state to deprive any person of life, liberty or property without due process of law, means the settled course of judicial procedure as determined by the law of the State. U. S. C. A. Const. Amend. 14, Republic of Hawaii *v.* Edwards, 11 Haw. 571."

From Words & Phrases, Per. Ed. Vol. 13, page 537.

In *Scott* v. *McNeal*, 154 U. S. 45, 14 Sup. Ct. Rep. 1112, in opinion by Mr. Justice Gray, this Court said:

> "The fourteenth article of amendment of the constitution of the United States, after other provisions which do not touch this case, ordains: 'Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities. Virginia *v.* Rives, 100 U. S. 313, 318, 319; Ex Parte Virginia, Id. 339, 346; Neal *v.* Delaware, 103 U. S. 370, 397. And the first one, as said by Chief Justice Waite in U. S. *v.* Cruikshank, 92 U. S. 542, 554, repeating the words of Mr. Justice Johnson in Bank *v.* Oakly, 4 Wheat. 235, 244, was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'"

See also:

Chicago, B. & Q. R. R. Co. v. *City of Chicago*, 166 U. S. 226, 17 Sup. Ct. Rep. 581.

Nashville &c. Ry. Co. v. *Taylor*, 86 Fed. 168, 183, 184.

Ex Parte Stricker (C. C. D. Ky.), 109 Fed. 145, where District Judge Evans, at p. 150, said:

> "• • • that, as applied to judicial action, 'due process of law' means • • • fourth, that since the adoption of the Fourteenth Amendment to the Constitution of the United States the validity of a judgment of a state court may be questioned, and its enforcement resisted upon the ground that proceedings in a court of justice to determine the personal rights of citizens over whom the court had acquired no jurisdiction do not constitute due process of law; fifth, that the equal protection of the law is denied by a state court when it is apparent that the same law or course

of procedure would not and could not be applied to any other person in the same state under similar circumstances."

In *Andrus* v. *Fidelity Mutual Life Ins. Co.*, 168 Mo. 151, 67 S. W. 582, it was held that this constitutional provision was not intended to control or regulate mere matters of practice in the State courts, but was intended to secure the same—an equal—protection to every person or company in the same class.

See also, *Commercial Min. Co.* v. *Iron Cap Cop. Co.*, 236 Mass. 185, 128 N. E. 4.

"The 'due process of law' to which the Fourteenth Amendment of the Federal Constitution refers, is not confined to proceedings and judgments in trial courts, but includes also proceedings on appeal in a state court.

United States ex rel. Henson v. *Miles* (D. C. Pa.), 21 Fed. Supp. 616.

"The words 'due process of law' when applied to judicial procedings, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.' *Pennoyer* v. *Neff*, 95 U. S. 714, 733, 24 L. ed. 565, 572; *Scott v. McNeel*, 154 U. S. 34, 46, 38 L. Ed. 896, 14 Sup. Ct. Rep. 1108."

Endicott-Johnson Corp'n v. *Encyclopedia Press, Inc.*, 266 U. S. 285, 60 L. Ed. 288-292.

It would seem to be clear that, if the judgment of the Court of Appeals had become final when respondent Faw's petition for certiorari was denied by opinion announced May 5, 1945, and the petition to rehear the opinion of the Supreme Court denying said petition for certiorari was overruled by opinion handed down June 8, 1945, and the Clerk

remanded the cause to the Chancery Court at Johnson City pursuant to sections 8867 and 9051.1 of the 1932 Williams Code of Tennessee, annotated, and the case reinstated in the Chancery Court pursuant to section 10531 of Williams Code, then the rights of petitioner McArthur became vested and fixed and could not be divested by the granting of a subsequent petition to rehear, or any petition filed to be allowed to file a subsequent petition. Such practice would be contrary to the established forms of law and practice, and an arbitrary denial of petitioner McArthur's vested rights and denial of due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States.

The reason assigned by the Supreme Court of Tennessee for granting the so-called second petition to rehear is given in its per curiam opinion, in the following language:

> "While rarely entertained, a second petition to rehear has in exceptional cases been permitted and there is no rule or statute denying such authority to the Court. In this particular case some members of the Court were sick, not present when the first petition to rehear was under consideration, and the full court being assembled thought that the second petition to rehear should be entertained, certiorari granted, and the case argued. This was accordingly done."
>
> R. 335, 193 S. W. pp. 768-69.

The denial of the writ, whether by one or more justices less than all of the justices, is none the less the action of the Court and not of the justice or justices denying the writ, according to the decision of the Supreme Court of Tennessee, as early as 1928, in *Beard* v. *Beard*, 158 Tenn. 437. The illness of one or more of the justices could therefore scarcely furnish, under our long established rules of law and practice, justification for undoing that which the Court had done, and assuming a jurisdiction which had

been declined and lost, under statutes and long established rules and precedents.

III

The Question of Violation of Petitioner's Constitutional Rights Was Raised at the First Opportunity

When the Supreme Court of Tennessee granted an order on June 30, 1945, allowing the writ of certiorari in this case, petitioner McArthur, believing the Court acted inadvertently, filed on July 10, 1945, what he designated as a petition to rehear. Such a petition did not, however, lie at that time, as the opinion and order of the Court were interlocutory. Its purpose was merely to call the Court's attention to the unusual course being taken and the inadvertence into which we believed the Court had fallen. No affirmative or final action to deprive petitioner of his constitutional rights was taken by the Court until its opinion of January 19, 1946 (R. 264). In view of the fact that the inadvertence to which we had called the Court's attention was not mentioned in its opinion of January 19, 1946, it would appear that the Court either pretermitted it inadvertently, or considered our petition to rehear its action in granting the writ premature. In any event, we could not anticipate the action of the Court in its opinion of January 19, 1946, and promptly filed our petition to rehear on January 28, 1946, urging upon the Court that its action on January 19, 1946, denied to petitioner McArthur his constitutional rights under the Fifth and Fourteenth Amendments to the Federal Constitution, which was, we submit, at the first opportunity.

Saunders v. *Shaw*, 244 U. S. 317, 61 L. Ed. 1163.

In its opinion of January 19, 1946 (R. 264), the Supreme Court of Tennessee decided the case on questions never raised or discussed either in briefs or oral arguments,

and, notwithstanding petitioner McArthur pointed this out to the Court and asked that the cause be reset for oral argument on the questions on which the Court based its opinion (R. 303), and notwithstanding the provisions of Code Section 10629 that no writ of certiorari shall be granted unless the cause is set down for oral argument, the Court declined to hear oral argument on these questions (R. 337).

Conclusion

We respectfully submit, for the reasons and upon the grounds pointed out, this case is one calling for review by this Honorable Court, in order that petitioner McArthur may not be denied the equal protection of the law, and deprived of his rights and property without due process of law, which rights are guaranteed to him under the Fourteenth Amendment to the Constitution of the United States, Section 1, and that justice may be done; and to that end that the writ of certiorari be granted, and the opinion and decree of the Supreme Court of Tennessee complained of be reviewed and reversed.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 316.

M. T. McARTHUR,
Petitioner,

vs.

WILLIAM W. FAW et al.,
Respondents.

OBJECTIONS

To Petition for Writ of Certiorari and Brief in Support of Objections to Granting Writ.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

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M. T. McARTHUR,
Petitioner,

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WILLIAM W. FAW et al.,
Respondents.

OBJECTIONS

To Petition for Writ of Certiorari and Brief in Support of Objections to Granting Writ.

OBJECTIONS OF RESPONDENT WILLIAM W. FAW TO JURISDICTION TO GRANT WRIT.

Respondent William W. Faw in the above styled case respectfully objects to the jurisdiction of the Court to grant a writ of certiorari, asserted by the petitioner, for the following reasons:

1. No real or substantial federal question is presented for the consideration of the Court.

2. The statement of facts presented with the petition does not show that the nature of the case and the rulings in the State Court were such as to bring the case within the jurisdictional provisions relied upon for the writ of certiorari.

3. The alleged federal questions presented are so frivolous as to indicate that the only purpose of the petition for a writ of certiorari is delay.

4. The petition for the writ of certiorari discloses that the questions presented are all questions of local law, practice, and procedure, and do not involve or present any federal question.

5. The petition for the writ of certiorari, notwithstanding the conclusion of the petitioner to the contrary, discloses that the alleged federal questions relied upon in the petition were not made in the State Court at the first opportunity.

Wherefore, the respondent respectfully prays that the petition for a writ of certiorari be denied.

JAS. H. EPPS, JR.,
ROBERT L. TAYLOR,
WM. E. MILLER,
Johnson City, Tennessee,
Attorneys for Respondent.

BRIEF OF WILLIAM W. FAW, RESPONDENT,

In Support of Objections to Granting Writ of Certiorari and in Reply to Brief Filed by Petitioner in Support of Petition for Writ of Certiorari.

I.

INACCURACIES AND OMISSIONS IN PETITIONER'S STATEMENT OF THE CASE.

Respondent will not make a statement of the case except to point out certain inaccuracies and omissions in the statement of petitioner.

The inaccurate statement is made by petitioner that respondent did not file in the State Supreme Court a second petition to rehear (Petition and Brief pp. 2, 13). But, in fact, a second petition to rehear was filed after express permission from the Supreme Court was obtained, as was shown on the face of the second petition to rehear.

> (R. 246. This permission was evidenced by an endorsement on the margin of the petition which was omitted in printing.)

The second petition states, among other things, that:

> "Believing, as aforesaid, that the learned Court of Appeals erred and that the cause should be reversed, petitioner, with the utmost deference to this Honorable Court asks permission to file another petition to rehear, or, **in the alternative, that this motion be treated as a petition to rehear, and that the cause be heard and the opinion and decree of the Court of Appeals be reversed**" (R. 248. Emphasis ours.)

A copy of the first petition to rehear was attached to the second petition and made a part thereof (R. 246).

Petitioner, while stating in the petition for certiorari,

that the cause was remanded to the Chancery Court after the first petition to rehear was overruled, fails to state that the procedendo was irregularly issued from the office of the Clerk of the Court of Appeals in Knoxville to the Clerk and Master in the Chancery Court in Johnson City (Petition p. 2). In fact, the procedendo was actually issued from the office of the Clerk of the Court of Appeals at Knoxville "due to oversight," on June 8, 1945, although respondent's first petition to rehear was still pending before the Supreme Court in Nashville and was not overruled by that Court until the following day, viz., June 9, 1945, all as set forth in the affidavit of a Secretary in the office of the Clerk of the Court of Appeals at Knoxville (R. 320). Parenthetically, it is here pointed out, to avoid confusion, that the Clerk of the Supreme Court at Knoxville is also the Clerk of the Court of Appeals, but the procedendo so issued by the Clerk's assistant purported to be the procedendo of the Court of Appeals.

Attempting to avoid the effect of the irregular issuance of the procedendo from the Court of Appeals on June 8, 1945, while the first petition to rehear was still pending before the Supreme Court, petitioner repeatedly asserts that the Supreme Court denied the first petition to rehear on June 8, 1945 (this being the same date that the procedendo was issued) instead of on June 9, 1945 (Petition and Brief pp. 5, 7, 13, 18, 19). To establish June 8 as the correct date of the Supreme Court's decision denying the first petition, petitioner relies upon the pencil notation "June 8, 1945," on the unsigned, unfiled, and incomplete copy of the Supreme Court's order denying the first petition (R. 245). This notation was obviously made by mistake, presumably by the same assistant who inadvertently issued the procedendo on that date, and such notation is not to be taken as indicating the date upon which the Court denied the first petition. That the Supreme Court actually passed upon the case and denied the petition on

June 9, 1945, is established by the certificate of the Clerk attached to the order denying the first petition to rehear, in which it is stated that "The foregoing decision was handed down at Nashville June 9, 1945" (R. 319). This fact is also shown by the "certiorari list" of cases acted on by the Supreme Court of Tennessee on June 9, 1945, and forwarded to the Clerk at Knoxville from the Clerk at Nashville (R. 333).

In fact, the petitioner, in the State Court, recognized that this was the correct date by repeatedly stating in the State Supreme Court that the respondent's petition to rehear was overruled by the Supreme Court on "June 9, 1945" (R. 251, 255, 258), thus taking a position in this Court diametrically opposed to the position assumed by him in the State Court.

For the convenience of the Court, a portion of the language in the affidavit of the Clerk's Secretary, showing the issuance by her of the procedendo through oversight on June 8, 1945, while the respondent's first petition to rehear was still pending and not disposed of, is here quoted:

> "I . . . do hereby state with reference to the procedendo . . . that I have examined the records in this office and from such examination find that due to oversight in not knowing of the first petition to rehear having been filed I issued said procedendo on June 8, 1945, although the petition to rehear was not acted upon until the following day, June 9, 1945" (R. 320).

It is insisted by respondent, as will be hereinafter pointed out, that whether the procedendo was regularly or irregularly issued from the Court of Appeals is immaterial, in view of the express holding of the Supreme Court of Tennessee in its per curiam opinion that the "remand statutes" of Tennessee relied upon by the petitioner "are not applicable to procedure" in the Supreme Court of Ten-

nessee where that Court has not yet taken jurisdiction of the case by the grant of certiorari (R. 335). However, the irregular issuance of the procedendo from the Court of Appeals is an additional reason, under the authorities, why the action of the Tennessee Supreme Court in taking jurisdiction of the cause was not in deprivation of any rights of the petitioner.

Petitioner also states erroneously that the Supreme Court of Tennessee decided the case on questions never raised or discussed either in briefs or oral arguments, and it is, therefore, insisted that the Court should have reset the case for oral argument on the questions on which the Court based its opinion Petition p. 8). The Supreme Court of Tennessee in reply to this assertion pointed out that the defense of invalidity of the proposed contract was directly made and argued by respondent and that the Court in its opinion of January 19, 1946, had merely suggested "additional reasons for the view that a contract had not been and could not be drawn which would protect against the claims of creditors of either party in case of insolvency" (R. 337).

It is further erroneously asserted by the petitioner that the respondent's second petition to rehear filed in the Supreme Court of Tennessee is in fact not a petition to rehear and does not comply with Rule 32 of the Court governing petitions to rehear (Brief p. 14). This petition shows on its face that it was filed as an application for permission to file a second petition to rehear, or, in the alternative, as a petition to rehear, all as hereinbefore pointed out (R. 248). The Supreme Court of Tennessee permitted the filing of the petition and thereafter sustained it as a petition to rehear, granted certiorari, and set the case down for argument (R. 249). This criticism of the form of the petition addresses itself to a matter of state practice and procedure, and the State Court having accepted the petition as in due form, no question is presented for consideration by this Court.

II.

ARGUMENT AND REPLY TO THE PETITIONER'S CONTENTIONS.

A.

Petitioner's Contentions.

The petitioner makes two contentions in support of his claim that the Supreme Court of Tennessee deprived him of alleged vested rights contrary to the 5th and 14th Amendments of the federal constitution.

The first contention of the petitioner is that his rights under the judgment or decree of the Court of Appeals of Tennessee became final and, therefore, vested when the Supreme Court of Tennessee denied certiorari and later denied the respondent's first petition to rehear, followed by the issuance of a procedendo remanding the case to the Chancery Court at Johnson City. It is argued in connection with this contention that the action of the Supreme Court of Tennessee in subsequently entertaining a second petition to rehear, granting certiorari and reviewing the case on its merits, and reversing the judgment or decree of the Court of Appeals, was beyond the jurisdiction of that Court and deprived the petitioner of his vested rights in violation of the due process clauses of the Fifth and Fourteenth Amendments to the federal constitution.

The further contention of the petitioner is that the action of the Supreme Court of Tennessee in granting a second petition to rehear and in taking jurisdiction of the case after a procedendo had issued to the trial court was a departure from the established rules of law and procedure in Tennessee, and, therefore, deprived the petitioner of the equal protection of the law in contravention of the equal protection clause of the Fourteenth Amendment to the federal constitution (Petition, pp. 2, 3; Brief, p. 21).

The claim made by petitioner that the action of the Supreme Court of Tennessee deprived him of alleged rights guaranteed by the Fifth Amendment to the federal constitution will not be further noticed inasmuch as that Amendment operates exclusively in restriction of federal power, and has no application to action by the States. Thorington v. Montgomery, 147 U. S. 490, 13 S. Ct. 394, 37 L. ed. 252; Capitol City Dairy Co. v. Ohio, 183 U. S. 238, 22 S. Ct. 120, 46 L. ed. 173.

B.

The Action of the Supreme Court of Tennessee Was Not Beyond Its Jurisdiction and Did Not Deprive Petitioner of Alleged Rights Without Due Process of Law.

In support of his insistence that the Supreme Court of Tennessee was without jurisdiction to grant the second petition to rehear after the procedendo had issued from the Clerk of the Court of Appeals, the petitioner cites and relies upon the Tennessee remand statutes embodied in Code Sections 8867, 9058.1 and 10531 (Williams 1932 Code of Tennessee) (Brief pp. 16, 17).

These statutes, as held by the Supreme Court of Tennessee in its per curiam opinion (R. 335, 336), have no application to procedure in the Supreme Court of Tennessee, **before that Court has taken jurisdiction to review a judgment or decree of the Court of Appeals by granting the writ of certiorari** (R. 335).

The State Court having held that the statutes relied upon are without application, there is, therefore, presented no federal question for review by this Court, it being the established rule that the meaning or construction given by the highest court of a state to the statute of a state is conclusive on review by this Court and that such meaning or construction is as much a part of the statute as if

specifically expressed therein. Supreme Lodge etc. v. Meyer, 265 U. S. 30, 44 S. Ct. 432, 68 L. ed. 885.

A closely related principle is that the rulings of the highest court of the state upon questions of local law will be accepted by this Court as the law of the state for the purpose of review. Copperwell Steel Company v. Industrial Commission of Ohio, 324 U. S. 780, 89 L. ed. 1363, 65 S. Ct. 1006; Herb v. Pitcairn, 324 U. S. 117, 65 S. Ct. 459, 89 L. ed. 789.

It has been held by this Court that the State Courts have supreme power to interpret and to determine the meaning to be given the written and unwritten laws of the State. Brikerhoff-Faris Trust and Savings Company v. Hill, 281 U. S. 673, 50 S. Ct. 451, 74 L. ed. 107.

It is equally well settled that the decision of the highest court of a state on a question of state procedure does not present a federal question. John v. Paullin, 231 U. S. 583, 58 L. ed. 381; 28 U. S. C. A., Sec. 344, Note 81, p. 251.

The due process clause does not control the forms of procedure nor regulate practice in the State Court. Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 20 S. Ct. 620, 44 L. ed. 747; Holmes v. Conway, 241 U. S. 624, 60 L. ed. 1211, 36 S. Ct. 681.

Neither does the due process clause control methods of state procedure or give jurisdiction to this Court to review errors of law alleged to have been committed by the State Court in the performance of its duties within the scope of its authority concerning matters non-federal in character. McDonald v. Oregon R. etc. Company, 233 U. S. 665, 58 L. ed. 1145, 34 S. Ct. 772; Frank v. Mangum, 237 U. S. 309, 59 L. ed. 969, 35 S. Ct. 582.

Applying these principles to the instant case, in view of the express ruling on the point by the highest court of Tennessee it must be concluded that the Tennessee remand statutes relied upon by the petitioner are without applica-

tion and, therefore, did not limit or curtail in any way the authority or jurisdiction of the State Supreme Court to correct its previous order by granting certiorari and reviewing the case on its merits. The holding of the State Supreme Court that the remand statutes did not apply, and that it had authority to correct its previous order, relates to the construction and meaning of Tennessee statutes and Tennessee procedural practice, and the same meaning and construction will be adopted by this Court in adjudicating the claims of the petitioner that his rights under the federal constitution have been violated.

By the same token it must, we respectfully insist, be accepted that there was no limitation of time within which the State Supreme Court could grant certiorari after the petition for certiorari had been filed within the required time. This point was also directly decided by the State Supreme Court in its per curiam opinion, it being pointed out that the applicable statute creating the Court of Appeals in Tennessee and vesting in the Supreme Court revisory jurisdiction of its decrees by certiorari does not limit the time in which the Supreme Court shall act upon a petition for certiorari directed to the action of the Court of Appeals (R. 336).

The findings and holdings of the State Supreme Court on the questions relating to its own jurisdiction and authority are clearly shown in the following excerpt from its per curiam opinion:

> "A petition to rehear is filed by McArthur in which we are asked to reconsider our opinion and set aside the decree entered herein by this Court.
>
> "The first ground of the petition is that the Court lost jurisdiction of the case after denying the petition for certiorari directed to the decree of the Court of Appeals and denying a petition to rehear and reconsider that denial. A second petition to rehear was

filed which the Court permitted and upon consideration of the second petition certiorari was granted and the case set down for argument.

"A procedendo issued from the Court of Appeals, while the first petition to rehear was pending in this Court, remanding the cause to the Chancery Court of Washington County and the procedendo was filed in that Court. This was an inadvertence, the clerk has advised us, and many cases (84 A. L. R. 591) hold that a procedendo or mandate issued under such circumstances may be recalled or stayed. The latter action was taken by this Court.

"While rarely entertained, a second petition to rehear has in exceptional cases been permitted and there is no rule or statute denying such authority to the Court. In this particular case some members of the Court were sick, not present when the first petition to rehear was under consideration, and the full Court being assembled thought that the second petition to rehear should be entertained, certiorari granted, and the case argued. This was accordingly done. As a matter of fact, this Court never took jurisdiction of the cause until after the second petition to rehear was granted and the writ of certiorari to the Court of Appeals awarded. The case not having been in this Court until the writ of certiorari was granted, sections 8867 and 10531 of the Code are not applicable to procedure here. The Court had power at the same term to correct its previous orders as to grant of certiorari.

"Chapter 100 of the Acts of 1925 creating the Court of Appeals and providing the revisory jurisdiction of this Court does not limit the time in which this Court shall act upon a petition for certiorari directed to the action of the intermediate Court. Petitions for certiorari must be filed in a limited time but no time is prescribed for the disposition of these petitions. The powers of this Court necessary to exercise and enforcement of its jurisdiction are very broad. Section 10637 of the Code is as follows:

'The Court may appoint receivers, order references and issue all writs and process necessary for the exercise and enforcement of its jurisdiction.'

"The Court having concluded that it properly should have taken jurisdiction of the cause and granted the petition for certiorari, and the time in which it might grant the writ to review a decree of the court of appeals not being limited, acted within its power in granting the writ upon becoming satisfied of a mistake in its former refusal. Having taken jurisdiction of the cause, the Court had full authority, under Code Sec. 10637 above cited, by way of exercising and enforcing its own jurisdiction to stay proceedings under the procedendo irregularly issued from the Court of Appeals" (Southwestern Reporter, Advance Sheet, dated May 21, 1946, S. W. Vol. 193, pp. 768-769) (R. 335-336).

Rule 32 of the Tennessee Supreme Court allows the filing of one petition for rehearing as a matter of right, if the requirements of the rule are complied with, but as a matter of state practice and procedure, as held by the Supreme Court in its per curiam opinion in the instant case, and as held by implication, if not expressly, in the case of Foster v. Burem, 1 Heisk. (48 Tenn.) 783, the Court may in its discretion grant additional petitions to rehear if and when the justice of the case may require.

As held in Foster v. Burem, supra:

"This Court clearly has the power to adopt and use the necessary means for the exercise of its appellate jurisdiction, else in many cases it must entirely fail. It must have the power to remedy such imperfections as occur after its jurisdiction has attached . . . the Court has the inherent power to cure the defect; and under the provision in the Code, 4504 (Williams, Official Code, 10638), authorizing the Court to establish its own rules of practice, **we think the Court has the power to make and establish a rule,**

when a case arises to which there is no rule now in use that applies." (Emphasis ours.) (p. 784.)

In Tennessee there is no prohibition in Rule 32 of the Supreme Court or in any statutory or constitutional provision against the granting of more than one petition to rehear, and under the authority of the Foster v. Burem case, the Court may, under its inherent powers, establish a rule for the occasion in order to do substantial justice in the case. In fact, as held in Tennessee, the Court which makes a rule may relax such rule if necessary for the attainment of substantial justice. Hilton v. Johnson City General Hospital, 160 Tenn. 535; Cozart v. Lislie, 1 Meigs. (19 Tenn.) 65; Thompson v. Haws, 25 Tenn. App. 592; Anderson v. Striblin, 15 Tenn. App., p. 267; Heineman v. Netherlands Insurance Company, 10 Tenn. App. 490. Moreover, as will be set out hereinafter, the appellate courts of Tennessee (both the Supreme Court and the Court of Appeals) have on a number of occasions permitted the filing of and have considered second and even third petitions to rehear.

It is respectfully submitted, therefore, that the petitioner's argument that the State Supreme Court deprived him of vested rights in contravention of the federal constitution is unsound and wholly fails to present any question for the consideration of this Court.

C.

The Action of the Supreme Court of Tennessee Was in Accordance With Authorized Tennessee Procedure and Did Not Deprive Petitioner of Equal Protection of Law.

As specifically pointed out by the State Court in its per curiam opinion, it is the practice of that Court to permit more than one petition to rehear when the justice

of the case requires, and in Tennessee "there is no rule or statute denying such authority to the Court" (R. 335). This is a salutary rule which enables the Court to correct its own errors and to prevent a failure of justice.

The practice of filing more than one petition to rehear has been generally followed in Tennessee and is a thoroughly recognized procedure. The petitioner's claim that the Court departed from "the long and well-established law and rules of proceure in Tennessee" and thereby denied "to Petitioner McArthur the equal protection of law" (Petition p. 7) is not only not supported by the citation of authority or rule of practice in Tennessee but is directly refuted by the practice of the Appellate Courts of that state over a long period of years in entertaining and considering cases upon more than one petition to rehear. This established practice in Tennessee is amply demonstrated by an examination of the following cases in which more than one petition to rehear was filed and considered by the Court:

Andrews et al. v. Crenshaw et al. (1871), 4 Heisk. (51 Tenn.) 151.

In that case the Court said:

"For the third time, during the present term, this large record is before us, on a respectful and ingenious petition for rehearing, which, . . ." (Op., p. 151).

Fire Insurance Co. v. Ford and Cantrell, 164 Tenn. 107;

Freeman et al. v. Martin, 181 Tenn. 470.

On page 473 of the last referred to opinion it is shown that two petitions to rehear were filed in the Court of Appeals of Tennessee.

Life & Casualty Ins. Co. v. Mitchell, 14 Tenn. App. 409.

Since the Tennessee Court had the power to grant respondent's second petition to rehear, petitioner was not deprived of any rights under the equal protection clause of the Fourteenth Amendment, even if it could be said that the Court overruled a precedent in granting the second petition to rehear, or if it could be said that in granting such petition, the Court adopted a procedure for the rehearing of cases which had not theretofore obtained. Such ruling by the Court relates to a matter of State practice and procedure. If the Court had jurisdiction to regulate its own practice and procedure and therefore to allow a second petition to rehear (and there can be no doubt that the Court did possess such power), the petitioner had no right, vested or otherwise, to have the practice or procedure of the Court remain static or unchanged. There is no vested right in the forms of procedure and the equal protection clause of the Fourteenth Amendment does not limit a State Court in determining the scope and effect of the doctrine of stare decisis, nor prevent it from overruling former decisions as to modes of procedure. Backus v. Fort St. Union Depot, 169 U. S. 557, 18 S. Ct. 445, 42 L. ed. 853; Great Northern Railway Company v. Sunburst Oil and Refining Company, 287 U. S. 358, 53 S. Ct. 145, 77 L. ed. 360.

It is no ground for review by this Court under the Fourteenth Amendment that the State Court has made a merely erroneous application of State law or even that it has overruled previous decisions on which a party has relied. Brikerhoff-Faris Trust and Savings Company v. Hill, supra, 281 U. S. 673, 74 L. ed. 1107.

It is, therefore, respectfully submitted (a) that the procedure followed by the Supreme Court of Tennessee was not a novel procedure or a departure from authorized practice but on the contrary was a recognized procedure for which there are numerous precedents; and that (b) no federal question is presented under the equal protection

or due process clauses of the Fourteenth Amendment, even upon the hypothesis that the Court adopted a procedure which had not theretofore prevailed, or departed from the established procedure in Tennessee in order to reach the justice of the case and to correct its own error.

D.

The Procedendo From the Court of Appeals Was Issued Irregularly and by Inadvertence.

In view of the ruling of the Tennessee Supreme Court that the remand statutes of that State are not applicable and do not operate to curtail or limit the authority of the Supreme Court in taking jurisdiction of cases by certiorari, it is not material in this proceeding whether the procedendo from the Court of Appeals was issued by the Clerk regularly or irregularly. However, the fact that the procedendo was actually issued through oversight by an assistant in the Clerk's office without taking cognizance of the fact that a petition to rehear had been filed in the Supreme Court and was still pending in that Court and undisposed of, constitutes an additional reason why the action of the Supreme Court of Tennessee in taking jurisdiction of the cause was not in deprivation of any rights of petitioner.

Although the petitioner argues in his petition for certiorari that the procedendo was issued on the same date that the Supreme Court of Tennessee denied the first petition to rehear, viz., June 8, 1945, the fact is, as hereinbefore pointed out, that the procedendo was issued by the Clerk inadvertently on June 8 and the first petition to rehear was not denied by the Supreme Court until the following day, viz., June 9, 1945 (R. 320). The assistant in the Clerk's office who issued the procedendo actually issued it without knowing that a petition to rehear had been filed in the Supreme Court and was then pending for disposition (R. 320). The Supreme Court of Tennessee,

therefore, held in its per curiam opinion that the procedendo had been inadvertently issued and that, upon that ground, as well as for the reason that the remand statutes did not apply in any event, the Court had authority to recall the mandate or to stay it and to take jurisdiction of the cause by granting certiorari (R. 335). Having assumed jurisdiction of the cause by granting certiorari the Court, under Code Sec. 10637, which confers upon the Supreme Court authority to issue all writs and process necessary for the exercise and enforcement of its jurisdiction, possessed the right and power to "stay proceedings under the procedendo irregularly issued from the Court of Appeals," which the Court did (R. 336).

Petitioner relies upon authorities from jurisdictions other than Tennessee in support of his argument that an appellate court after the remand of the case to the trial court is deprived of further jurisdiction, citing Am. Jur. Vol. 3, p. 345, Appeals and Error Sec. 796, and Note in 84 A. L. R. beginning at page 579. It will be observed that the authorities cited by petitioner holding that an appellate court was deprived of jurisdiction by the remand of the case to the trial court, were decided under applicable remand statutes, and it was **presupposed** that the remand was "regular" and not inadvertent or resulting from mistake or oversight.

The well established rule is that an appellate court is not deprived of jurisdiction by the irregular or inadvertent issuance of a procedendo or mandate.

For this additional and alternative reason, therefore, the Supreme Court of Tennessee in the instant case was not deprived of jurisdiction by the inadvertent act of the Clerk in sending out a procedendo, and that Court had authority to assume jurisdiction by certiorari and to stay further proceedings under the procedendo.

E.

Authorities Cited by Petitioner Not Applicable.

As heretofore pointed out the petitioner has failed to cite any case denying to the Supreme Court of Tennessee the authority to consider and pass upon the case upon a second petition to rehear, as the Court did do. The cases which are cited by petitioner are clearly not in point. For example, the case of Overton v. Bigelow, 10 Yerger (18 Tenn.) p. 48, cited by petitioner (Brief p. 19) merely holds that a Chancery Court in Tennessee cannot consider a petition to rehear filed at a term subsequent to the term at which the final decree was rendered. This decision rests upon the statutory provision in Tennessee that a final decree is beyond the control of the **trial court** after the adjournment of the term at which it was rendered.

The case of Shipley v. Barnett, 161 Tenn. p. 439, cited by petitioner (Brief p. 19) held that the trial court lost jurisdiction of the case under the Act of 1885, thirty days after the rendition of the judgment, although the term of Court had not adjourned. This decision, of course, is predicated upon the provisions of the statute applicable only to trial courts in Tennessee, and the ruling could have no application to limit the authority and jurisdiction of the Supreme Court of Tennessee.

Petitioner quotes at length from Words and Phrases, from decisions of lower Federal Courts, and even from the decisions of State Courts, as to the definition of "due process of law," and particularly for the proposition, which is labored at great length, that due process of law under the Fourteenth Amendment applies to judicial proceedings or to action by a State Court, as well as to action by a State Legislature or other arm of the State Government (Brief, pp. 21, 22, 23). Although these quotations by petitioner set forth accepted abstract principles of law, such principles have no application in the determination of any question involved in the instant case.

F.

Petitioner Did Not Raise Alleged Federal Questions at First Opportunity.

Although the petitioner asserts that he raised in the State Court at the first opportunity the alleged federal questions now relied upon, the record shows that he did not raise such questions until after the Court decided the case on the merits.

The decision on the merits was rendered January 19, 1946 (R. 264) and petitioner filed a petition to rehear on January 28, 1946 (R. 275) in which he raised the claimed federal questions for the first time. The order sustaining the second petition to rehear and granting the writ of certiorari was filed July 1, 1945 (R. 249), and petitioner on July 10, 1945 filed a petition to rehear (R. 249 et seq.) in which he urged the Court to set aside the order granting the petition for certiorari, but he did not insist in such petition to rehear that his rights had been violated in contravention of any provision of the federal constitution.

It would appear, therefore, that the petitioner could and should have raised the alleged federal questions now relied upon, in his petition to rehear, filed on July 10, 1945, when he took exception to the action of the Court in granting certiorari, and when he urged that the action of the Court in sustaining a second petition to rehear was contrary to established practice and to the rights of the petitioner.

See:

Goadchaux Co. v. Estopinal, 251 U. S. 179, 40 S. Ct. 116, 64 L. ed., p. 213;

American Surety Company v. Baldwin, 287 U. S. 156, 53 S. Ct. 98, 77 L. ed. 231;

Radio Station WOW, Inc., v. Johnson, 326 U. S. 120, 89 L. ed. 2092.

G.

Petition for Certiorari Filed for Purpose of Delay.

Respondent insists that the entire record discloses that these proceedings are taken for the purpose of delay.

The petitioner instituted his suit in the State Court on August 3, 1943 (R. 1), and an injunction was issued prohibiting the holding of stockholders' and directors' meetings pending the outcome of litigation in the Tennessee Court (R. 132).

On the 26th of March, 1946, petitioner obtained a stay order from the Chief Justice of the Tennessee Supreme Court, staying the execution of that Court's decree until the disposition by this Court of the petition for certiorari (R. 339), but immediately before obtaining the stay order from the Chief Justice, the petitioner instituted suit in the United States District Court at Greeneville, Tennessee, seeking to set up the same contractual rights in the same corporate stock that are involved in this case, and the petitioner's suit in the District Court of the United States at Greeneville is now pending (R. 341).

Meanwhile, the petitioner has been in charge of the John Sevier Hotel Corporation as Manager during the entire period covered by the litigation, and by virtue of the restraining order he has not been required to make reports to the directors or stockholders as to his management of the hotel (R. 10, 53, 54).

The respondent respectfully insists that the foregoing facts, particularly the petitioner's institution of an independent suit upon the same subject matter and to enforce the same alleged rights in the United States District Court at Greeneville Tennessee, after the Supreme Court of Tennessee decided the instant case adversely to him, when considered in conjunction with the petitioner's failure to point out the violation of any federal rights by the Supreme

Court of Tennessee, not only justifies the conclusion that the petition for certiorari is frivolous in nature but also that it was filed for the real purpose of delay and to continue the petitioner in control of the corporation as its Manager. For the same reasons and based upon the same facts, it is insisted that the petition is designed for the purpose of harassing the respondent and thwarting him in the enjoyment of those rights as a majority stockholder of the John Sevier Hotel Corporation which have been determined and adjudicated by the Supreme Court of Tennessee after a protracted litigation, extending over a period of approximately two years and six months.

Respondent respectfully submits that the petition for the writ of certiorari should be denied.

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